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SABIN CENTER FOR CLIMATE CHANGE LAW

**FREE MOVEMENT
AGREEMENTS & CLIMATE-
INDUCED MIGRATION:
A Caribbean Case Study**

By Ama Francis

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EXECUTIVE SUMMARY

Climate-induced migration has become a global challenge. Climate change intensifies the frequency and severity of disasters, thereby increasing the number of people displaced by extreme weather events. Adverse climate impacts are already exacerbating patterns of human mobility, and will do so to a greater degree in the future. The Internal Displacement Monitoring Center (IDMC) reports that approximately 265 million people have been displaced by natural hazards since 2008. Over 17 million people were internally displaced by disasters in 2018 alone. While the majority of climate migrants are displaced within their home countries, many people are forced to move abroad.

The Caribbean region is particularly at risk in regard to climate-induced migration. The ten countries and territories worldwide with the highest average annual internal displacement per capita are all small island developing states (SIDS), the top six of which are located in the Caribbean. Although SIDS experience lower absolute displacement risk compared with more populous countries like India and China, SIDS experience significant displacement relative to their population size. For example, IDMC reported before Hurricane Dorian (2019) that 5.9% of Bahamas' population will be annually displaced by hurricanes. The 2017 Atlantic Hurricane Season also demonstrates the extent of displacement risk in the Caribbean; three major hurricanes of the season—Harvey, Irma, and Maria—displaced approximately 3 million people in a single month.

While the Caribbean is particularly susceptible to displacement risk, the region also reveals a framework for addressing climate-induced migration; that is, Free Movement Agreements (FMAs). FMAs are provisions within (sub-)regional economic integration schemes that liberalize migration restrictions between participating member states. Two FMAs embedded within the (sub-)regional economic integration schemes, the Caribbean Community (CARICOM) and Organisation of Eastern Caribbean States (OECS), granted displaced Caribbean nationals important protection benefits after catastrophic hurricanes.

During the 2017 Atlantic Hurricane Season, CARICOM and OECS FMAs i) provided disaster displaced persons a right of entry in other islands; ii) supported the waiver of travel document requirements where documents had been lost or damaged; iii) granted indefinite stays to some disaster displaced persons, facilitating permanent resettlement; and iv) eased access to foreign labor markets through a mutual recognition of skills scheme and/or a waiver of work permit requirements.

The benefits that the CARICOM and OECS FMAs provided supported migrants in gaining stability after sudden-onset disasters, and will be formalized going forward.

The application of FMAs in post-disaster contexts is possible in other regions. More than one hundred countries worldwide participate in FMAs like that of CARICOM and OECS. FMAs can facilitate migration prompted by both slow- and sudden-onset disasters, and provide access to rights of entry, work, and resettlement to climate migrants. FMAs therefore offer a protection stop-gap in the absence of a governing legal framework for addressing climate-induced migration. Although recent international processes like the Global Compact on Safe, Orderly, and Regular Migration, the United Nations Framework Convention on Climate Change, and the Sendai Framework for the Disaster Risk Reduction have underscored the importance of climate-induced migration, no comprehensive multilateral framework governs the issue, and international law guarantees no protection to climate migrants who fall outside the scope of international refugee law. Regional solutions are useful in closing this climate-induced migration protection gap.

Key Findings:

During the 2017 Atlantic Hurricane Season, the CARICOM and OECS FMAs:

- 1. Provided disaster displaced persons a right of entry in other islands;**
 - After Hurricane Maria, Trinidad & Tobago used the CARICOM FMA's 6-month visa-free stay provision to shelter displaced Dominicans.
 - The Antigua, St. Vincent, Grenada and St. Lucia governments welcomed Dominicans, making use of the OECS FMA.
- 2. Supported the waiver of travel document requirements where documents had been lost or damaged;**
 - Immigration officials admitted Dominicans in some cases without the national identification documents, including passports, that are typically required.
 - Government officials used other forms of identification, including appearance, accent, and family networks, while prioritizing 100% admission of arriving Dominican nationals, and speed of registration and entry.

3. **Granted indefinite stays to some disaster displaced persons, facilitating permanent resettlement;**
 - The OECS FMA provides every OECS national the right to an indefinite stay in other OECS territories which allowed disaster displaced OECS nationals to legally resettle.
4. **Eased access to foreign labor markets through a mutual recognition of skills scheme and/or a waiver of work permit requirements;**
 - Some displaced CARICOM nationals were able to secure work in other CARICOM islands using CARICOM's work scheme for skilled nationals.
 - OECS automatically grants the right to work to OECS nationals in any OECS territory, allowing displaced OECS nationals to seek work in other islands.

FMA should be part of the policy response to climate-induced migration in other regional contexts because they:

1. **Respond to the complex and regional nature of climate-induced migration**, offering migration benefits regardless of whether migrants are moving for climate-specific reasons;
2. **Build structural and individual resilience** thereby strengthening migration as an adaptation response; and
3. **Can be amended to address climate-induced migration** without expending the political capital necessary for global multilateral initiatives.

This white paper uses the Caribbean as a case study to demonstrate the utility of FMAs in providing a protection framework for climate-induced migration in the absence of a governing multilateral framework and guaranteed rights. Other proposals for addressing climate-induced migration have not yet succeeded. A multilateral convention specifically on climate-induced migration would be difficult to design given the difficulty of linking particular instances of migration to any climate-related event. Proposals for integrating climate migrants into the international refugee regime face

a similar challenge. Providing a climate passport to climate migrants has not yet gained political traction. In contrast, FMAs should be part of the policy response to climate-induced migration because they increase regular migration pathways for climate migrants, enhance economic resilience, and can bypass the political hurdles of creating an international legal status for climate migrants.

Besides making a case for FMAs as a useful addition to the set of policy tools used to address climate-induced migration, this white paper also presents an opportunity to consider climate-induced migration in a Caribbean context, whereas most research on human mobility and climate change in relation to SIDS has focused on the Pacific.

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1. INTRODUCTION

Climate-induced migration presents the human face of climate change. Climate change intensifies the frequency and severity of disasters, thereby increasing the number of people displaced by extreme weather events.¹ Adverse climate change impacts are already exacerbating patterns of human mobility, and will do so in greater magnitude in the future.² The Internal Displacement Monitoring Center (IDMC) reports that approximately 265 million people have been displaced due to natural hazards since 2008.³ More than 17 million were internally displaced by disasters in 2018 alone.⁴ The majority of climate migrants are forced to move within their home countries, posing economic, developmental and social challenges for their national governments. However, while the majority of climate migrants remain within their own country, many people are also forced to move abroad.⁵

Cross-border climate-induced migration is a particular challenge for small island developing states (SIDS) and low-income countries whose response capacity can be overwhelmed by slow- and sudden-onset disasters.⁶ Internally displaced persons may also become cross-border migrants when they are unable to access adequate resources. Sudden-onset disasters in the Caribbean have already led to cross-border displacement from low- and middle-income SIDS. Hurricane Irma (2017), which displaced more than two million people, prompted the wholesale evacuation of the island of

¹ Adger, W.N. et al. 2014. "Human Security." In *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, ed. C.B. Field et al., 755–791. Cambridge, UK and New York, NY: Cambridge University Press.

² *Id.*

³ Internal Displacement Monitoring Center (IDMC), *Disaster Displacement: A Global Review 2008-2018* (2018).

⁴ Vicente Anzellini et al., "Global Report on Internal Displacement 2019" (Geneva, Switzerland: Internal Displacement Monitoring Centre), accessed July 8, 2019, <http://www.internal-displacement.org/global-report/grid2019/>.

⁵ The Nansen Initiative, "The Nansen Initiative Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change," (December 2015), *available at* <https://perma.cc/5E8M-M3DC>.

⁶ David Cantor, "Law, Policy and Practice Concerning the Humanitarian Protection of Aliens on a Temporary Basis in the Context of Disasters" (2015), *available at* <https://perma.cc/VDY5-NZ3M>.

Barbuda.⁷ After Hurricane Maria (also 2017), one fifth of Dominica’s population was forced to leave the island.⁸

Although recent processes like the Global Compact for Safe, Orderly, and Regular Migration (“Global Compact for Migration”), the Sendai Framework for Disaster Risk Reduction, and the United Nations Framework Convention on Climate Change have underscored the importance of addressing cross-border climate-induced migration, international law has yet to provide a governing framework for climate-induced migration. Furthermore, climate migrants enjoy no legal status under international law. While international refugee law provides protection to those displaced by instances of social upheaval such as political conflict, international refugee law does not provide protection to people solely displaced by climate-related disasters. The absence of both a comprehensive legal framework and legal rights creates a key protection gap for cross-border climate migrants.

This paper focuses on cross-border climate-induced migration, arguing that free movement agreements (FMAs)—provisions within (sub-)regional economic integration schemes that liberalize migration restrictions between participating member states—can provide protection benefits in the absence of a governing legal framework and guaranteed legal rights. The paper leverages the Caribbean as a case study to make this point. Part II provides an overview of the climate risks Caribbean SIDS face, introduces the concept of climate-induced migration, and analyzes key trends in human mobility patterns in the context of climate change. Part II also describes the legal protection gap surrounding climate migrants who are forced to leave their home countries. Part III offers a solution. Drawing on examples from the 2017 Atlantic Hurricane Season, Part III demonstrates how FMAs offer a protection stop-gap for climate-induced migration. Two Caribbean FMAs embedded within the Caribbean Community and Common Market (CARICOM) and the Organisation of Eastern Caribbean States (OECS) allowed disaster displaced persons to enter, work, and resettle in nearby Caribbean islands during the 2017 Atlantic Hurricane Season. Using the Caribbean as a case study, this paper will demonstrate how FMAs increase regular migration

⁷ IDMC, *2018 Global Report on Internal Displacement – the Americas* (2018), available at <https://perma.cc/Z5ND-JDYG>; see also Kate Lyons, *The Night Barbuda Died: How Hurricane Irma Created a Caribbean Ghost Town* (Nov. 20, 2017), available at <https://perma.cc/QN4W-64MZ>.

⁸ Magnus Hansen, *Exodus from Hurricane-Hit Dominica as Recovery Remains Elusive* (Oct. 18, 2017), available at <https://perma.cc/M3E4-Z7ZX>.

pathways for climate migrants. Part IV argues that FMAs are useful in other regional contexts. FMAs can enhance individual and structural economic resilience and bypass the political hurdles of creating an international legal status for climate migrants, while providing a rights-responsive framework for facilitating mobility increased by climate change.

2. CLIMATE VULNERABILITY & MIGRATION

2.1 SIDS Climate Challenges

Climate change poses an existential threat to both Caribbean and Pacific SIDS. The Intergovernmental Panel on Climate Change (IPCC) reports that increased aridity, decreased freshwater availability and sea level rise might render several atoll islands “uninhabitable” at 1.5°C of global warming.⁹ Average global temperature will increase by 1.5°C as early as 2030 at the current rate of global GHG emissions.¹⁰ Thus several atoll islands could become uninhabitable within the coming decades.

Impacts associated with sea level rise could also render atoll islands uninhabitable before they are completely submerged under water. Saltwater intrusion, soil salinization, and flooding undermine fresh water availability and agricultural capacity, elements necessary for sustaining human life. Frequent flooding destroys housing and infrastructure, and can wipe out livelihoods. Multiple Pacific islands have already reported increased water and food insecurity due to sea level rise.

In the Caribbean, increasingly intense and frequent storms also pose an existential challenge. A single extreme weather event can cause extensive economic damage, and roll back significant

⁹ Hoegh-Guldberg et al., 2018: Impacts of 1.5°C Global Warming on Natural and Human Systems. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V. et al. (eds.)]. In Press.

¹⁰ IPCC, 2018: Summary for Policymakers. In: *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* [Masson-Delmotte, V. et al. (eds.)]. World Meteorological Organization, Geneva, Switzerland, 32 pp.

development gains. Extreme weather events can also systematically disrupt infrastructure networks and erode the provision of important services like running water and electricity.¹¹ Hurricane Maria, for example, caused the equivalent of over 226% of GDP in total damages and losses in Dominica, and resulted in the failure of electricity service due to extensive damage to the transmission and distribution network.¹² With increasing climate change, the frequency of such economic and infrastructural devastation will increase.¹³ While sea level rise in the Pacific has come to define the existential threat climate change poses to SIDS, an average global temperature over 1.5°C above pre-industrial levels also poses a significant risk to Caribbean islands. Frequent storms threaten to render Caribbean SIDS economically inviable without significant adaptation measures.

Climate risk in the Caribbean also alters migration dynamics. Recent trends in Caribbean migration flows show a high level of environmental migration, alongside the outmigration of skilled professionals to Organization for Economic Co-operation and Development (OECD) countries, a disproportionate number of female migrants, and both voluntary and forced returns to the region.¹⁴ Scientists forecast that natural hazards, like tropical cyclones, heavy rains and floods, as well as droughts and sea level rise, will have the greatest impact on climate-induced migration in the region.¹⁵ Indeed, sudden-onset disasters in the Caribbean have already led to increased out-migration from disaster-impacted countries.¹⁶ For example, Hurricane Irma, the most powerful

¹¹ IPCC, 2014: Summary for policymakers. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Field, C.B. et al. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1-32.

¹² Government of the Commonwealth of Dominica, *Post-Disaster Needs Assessment Hurricane Maria* (Sept. 18, 2017), available at <https://perma.cc/8ZVZ-U6EW>.

¹³ Oppenheimer, M. et al., 2014: Emergent risks and key vulnerabilities. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Field, C.B. et al. (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1039-1099.

¹⁴ IOM, *Migration Governance in the Caribbean: Report on the Island States of the Commonwealth Caribbean* 15 (2018) available at <https://perma.cc/9PL8-9K42>.

¹⁵ Raoul Kaenzig & Etienne Pigué, *Migration and Climate Change in Latin America and the Caribbean*, in *PEOPLE ON THE MOVE IN A CHANGING CLIMATE* 155, 155 (2014).

¹⁶ O.C. Andrade Afonso, *Natural Disasters and Migration: Storms in Central America and the Caribbean and Immigration to the U.S.* (2011), available at <https://perma.cc/2YSK-Y68G>; see also J. Baez, G. Caruso, V. Mueller and C. Niu, *Heat Exposure and Youth Migration in Central America and the Caribbean*, 107 *AM. ECON. R.: PAPERS AND PROCEEDINGS* 446 (2017); J. Baez, G. Caruso, V. Mueller and C. Niu, *Droughts Augment Youth Migration in Northern Latin America and the Caribbean*, 140 *CLIMATIC CHANGE* 423 (2017); R.J. Nawrotzki, J. DeWaard, M. Bakhtsiyarava and J. Trang Ha, *Climate Shocks and Rural-Urban Migration on Mexico: Exploring Nonlinearities and Thresholds*, 140 *CLIMATIC CHANGE* 243 (2017); A. Cordero Ulate and G. Lathrop, *Relaciones entre Medio Ambiente y Migraciones en República Dominicana* (IOM 2016).

hurricane on record in the Atlantic, displaced two million people.¹⁷ Over 8.5 million people were displaced between 2008-2018 in 21 Caribbean countries.¹⁸ Displacement has significant consequences for development, health, human and national security, and livelihoods¹⁹; thus solutions to climate-induced migration remain critical.

2.2 Defining Climate-induced migration

Although migration has long been prompted by environmental disasters, climate change exacerbates this phenomenon.²⁰ The risk of being displaced by a disaster has quadrupled since the 1970s.²¹ After correcting for population growth, the likelihood of a person being displaced by a disaster has increased by 60% in the last 40 years worldwide.²² IDMC reports that 34 million people were displaced by sudden-onset disasters in 2008 alone, with 56% being displaced by climate-related disasters that year.²³ While the majority of climate migrants remain within their own country, some migrants are forced to move abroad due to both slow- and sudden-onset natural hazards.

The International Organization for Migration (IOM) defines an environmental migrant as “persons or groups of persons who, for compelling reasons of sudden or progressive change in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad.”²⁴ Although international law provides no definition of a climate migrant, climate-induced migration falls within the sub-category of environmental migration. Indeed, like

¹⁷ IOM *supra* note 14.

¹⁸ Caribbean Migration Consultations (CMC), *Consultation Towards a Framework for Regional Cooperation on Human Mobility in the Context of Disasters and the Adverse Effects of Climate Change in the Caribbean* (June 2019), available at <https://perma.cc/42AB-SHH4>.

¹⁹ World Bank, *Groundswell: Preparing for Internal Climate Migration* (2018), available at <https://perma.cc/HS6C-7GA9>.

²⁰ Jane McAdam ed., *CLIMATE CHANGE AND DISPLACEMENT 1* (2010).

²¹ Justin Ginetti, *Disaster-Related Displacement Risk: Measuring the Risk and Addressing Its Drivers* (IDMC, 2015).

²² Jon Barnett & W. Neil Adger, *Mobile Worlds: Choice at the Intersection of Demographic and Environmental Change*, 43 *Ann. Rev. Env't & Res.* 245, 252 (2018).

²³ Office for the Coordination of Humanitarian Affairs, Internal Displacement Monitoring Centre and the Norwegian Refugee Council, *Monitoring Disaster Displacement in the Context of Climate Change: Findings of a Study of the United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre* (OCHA, IDMC and the Norwegian Council 2009) 8.

²⁴ International Organization for Migration, *Discussion Note: Migration and the Environment*, MC/INF/288 (Nov. 1, 2007), para. 6, available at <https://perma.cc/8SY6-4T72>.

environmental migration, climate-induced migration can describe movement that is temporary or permanent, voluntary or forced, internal or cross-border.

Climate-induced migration occurs mostly within national borders, over short distances, with wealthier and more educated migrants tending to cross national borders. Policy experts identify five categories of movement, first described by Walter Kälin and Nina Schrepfer: i) migration prompted by sudden onset disasters, for example flooding and hurricanes, which tends to be temporary and internal; ii) slow-onset degradation, for example rising sea levels, increased groundwater and soil salinization, which often results in permanent migration; iii) “‘sinking’ small island states” which present a unique case of slow-onset disasters wherein rising sea levels combine with low-lying island topography to render islands uninhabitable; iv) high risk zones that governments declare dangerous for human habitation; and v) forced displacement due to violence, armed conflict, or unrest because of a scarcity of essential resources like water, arable land, or grazing grounds.²⁵

Across all categories, adverse environmental impacts do not lead to migration in a linear way; empirical studies have shown that many other factors play into the decision to move or stay.²⁶ Economic, social, and political drivers shape migration alongside climate change and other environmental indicators.²⁷ As the Foresight Report notes, “the range and complexity of the interactions” among drivers “means that it will rarely be possible to distinguish individuals for whom environmental actors are the sole driver.”²⁸ As a general matter, economic factors play a larger role in determining migration outcomes than environmental drivers at both the individual and structural level.²⁹

²⁵ Walter Kälin & Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change Normative Gaps and Possible Approaches*, UNHCR, 13-7 (Feb. 2012), <https://perma.cc/XGW9-5SMP>.

²⁶ DOMINIC KNIVETON ET AL., *CLIMATE CHANGE AND MIGRATION: IMPROVING METHODOLOGIES TO ESTIMATE FLOWS* 6 (2008).

²⁷ Foresight, *Migration and Global Environmental Change: Future Challenges and Opportunities* (2011), available at <https://perma.cc/GK84-7ADS>.

²⁸ *Id.*

²⁹ Jon Barnett & Michael Webber, *Accommodating Migration to Promote Adaptation to Climate Change* 6 (2010), available at <https://perma.cc/REW8-T9PH>.

2.3 Identifying the Legal Gap

A protection gap exists for migrants displaced across national borders by sudden- and slow-onset disasters, particularly from island and low-capacity states. This protection gap arises from the fact that international law does not confer a general right of entry for admission into a foreign country;³⁰ although migrants who qualify for protection under refugee law or complementary measures are protected from being rejected at the border.³¹ Where displacement occurs across borders, then, climate migrants find themselves with no right to enter another state, remain there, or be protected against forcible return.³² Instead, the status of these displaced persons is dependent upon the “generosity of host countries.”³³ In fact, the only situation in which international law may afford a right of entry to climate migrants occurs when environmental drivers combine with established grounds for protection under the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention).³⁴

The 1951 Refugee Convention extends protection to petitioners with a well-founded fear of persecution because of race, religion, nationality, political opinion, or membership of a particular social group. The petitioner must also be unable to gain protection from their home country. Although home governments may be unable or unwilling to protect those affected by climate-related events, the narrow grounds for persecution “makes it difficult to apply” the refugee convention to climate migrants seeking to resettle in receiving countries.³⁵ Persecution usually requires human agency, which climate impacts do not satisfy.³⁶ Furthermore, fleeing a slow- or sudden-onset disaster does not trigger any Convention ground—persecution due to race, religion, nationality, political opinion, or membership in a particular social group.³⁷ To date, no court has extended protection based on international refugee law to a climate migrant. In the 15-year period between

³⁰ GUY GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 94 (1977).

³¹ Walter Kälin, *Conceptualising Climate-Induced Displacement*, in *CLIMATE CHANGE AND DISPLACEMENT* 81, 87 (Jane McAdam ed., 2010).

³² *Id.* at 86-91.

³³ Kälin *supra* note 31 at 90-91.

³⁴ *Id.* at 92.

³⁵ See NZ Case Teitiota – Kiribati; United Nations Convention Relating to the Status of Refugees, art. 1(A)(2), opened for signature July 28, 1981, 189 U.N.T.S. 150.

³⁶ Jane McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 Windsor Y.B. Access Just. 1, 4 (2016).

³⁷ *Id.* at 5.

2000 and 2015, Pacific Islanders argued in more than twenty administrative and judicial cases in Australia and New Zealand that they should receive protection under refugee law because of climate change; none succeeded.³⁸

For example, in *Ioane Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment*, the New Zealand Supreme Court found that an I-Kiribati citizen, Teitiota, did not qualify as a refugee under international law. Teitiota sought refugee status in New Zealand because of the effects of sea level rise and environmental degradation in his home island Kiribati.³⁹ The Court found that Teitiota's case did not meet the required elements for refugee status under the Refugee Convention because "while Kiribati undoubtedly faces challenges, Mr. Teitiota does not, if returned, face 'serious harm' and there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can."⁴⁰ The Court noted, however, that its decision does not mean "that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction."⁴¹

In contrast, New Zealand's Immigration and Protection Tribunal did grant a resident visa to a family from Tuvalu based on "exceptional circumstances."⁴² In *In re: AD (Tuvalu) (2014)*, a family from Tuvalu sought resident visas in New Zealand. The family argued that they would suffer if they were deported to Tuvalu because of climate change impacts. The Immigration and Protection Tribunal found that the family had established "exceptional circumstances of a humanitarian nature,

³⁸ Jane McAdam, *Building International Approaches to Climate Change, Disasters, and Displacement*, 33 WINDSORY.B. ACCESS JUST. 1, 5 (2016); AF (Tuvalu), [2015] NZIPT 800859; AD (Tuvalu), [2014] NZIPT 501370; AC (Tuvalu), [2014] NZIPT 800517–520 [AC (Tuvalu)]; Teitiota 2013, supra note 15; Teitiota 2014, supra note 14; AF (Kiribati) 2013, supra note 15; Refugee Appeal no 72719/2001, RSAA (17 September 2001) (Tuvalu); Refugee Appeal no 72313/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal no 72314/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal no 72315/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal no 72316/2000, RSAA (19 October 2000) (Tuvalu); Refugee Appeal nos 72179–72181/2000, RSAA (31 August 2000) (Tuvalu); Refugee Appeal nos 72189–72195/2000, RSAA (17 August 2000) (Tuvalu); Refugee Appeal no 72185/2000, RSAA (10 August 2000) (Tuvalu); Refugee Appeal no 72186/2000, RSAA (10 August 2000) (Tuvalu). Australian cases: 1004726, [2010] RRTA 845 (30 September 2010) (Tonga); 0907346, [2009] RRTA 1168 (10 December 2009) (Kiribati); N00/34089, [2000] RRTA 1052 (17 November 2000) (Tuvalu); N95/09386, [1996] RRTA 3191 (7 November 1996) (Tuvalu); N96/10806, [1996] RRTA 3195 (7 November 1996) (Tuvalu); N99/30231, [2000] RRTA 17 (10 January 2000) (Tuvalu); V94/02840, [1995] RRTA 2383 (23 October 1995) (Tuvalu).

³⁹ *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment*, [2014] NZCA 173 (New Zealand).

⁴⁰ *Id.* at para 12.

⁴¹ *Id.* at para 13.

⁴² *Id.* at para 30.

which would make it unjust or unduly harsh for the appellants to be removed from New Zealand” pursuant to New Zealand’s Immigration Act of 2009.⁴³ The Tribunal based its finding partly on the fact that the family had relatives already residing in New Zealand. The Tribunal declined to reach the question of whether climate change provided a basis for granting resident visas in this case, although the Tribunal acknowledged that climate change impacts may undermine the enjoyment of human rights.

Some regional bodies have expanded the refugee definition such that climate migrants could qualify. The 1969 Organization of African Unity Convention extends protection to persons fleeing to another country because of “external aggression, occupation, foreign domination or events seriously disturbing public order.”⁴⁴ The 1984 Cartagena Declaration’s definition similarly includes those who are displaced because their “lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”⁴⁵ Both these frameworks have been used in cases of environmental migration. The OAU Convention was mobilized in 2011 and 2012 by Kenya, Ethiopia and other East African countries, who accepted 300,000 Somali refugees fleeing severe drought.⁴⁶ Ecuador used the Cartagena Declaration to admit Haitians fleeing the 2010 earthquake.⁴⁷ Nevertheless, these regional interventions remain the exception, not the norm.

Scholars and practitioners have responded to the protection gap surrounding climate-induced migration by arguing for: i) the integration of disaster displaced persons into the international refugee law framework; ii) the expansion of existing bilateral and regional protective programs and provisions; and/or iii) the creation of new legal devices. Early interventions, sometimes state-backed, called for the inclusion of climate-induced migration within international

⁴³ *Id.*

⁴⁴ African Union, *Convention Governing Specific Aspects of Refugee Problems in Africa* (1969) Article 2.

⁴⁵ Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees* (1984) Conclusion III.3.

⁴⁶ Walter Kälin, *Interview: Deciding Whether to Migrate and Where to Go*, available at <https://perma.cc/MTP3-8A2U>.

⁴⁷ David Cantor, *Cross-border Displacement, Climate Change and Disasters: Latin America and the Caribbean* (July 2018).

refugee law.⁴⁸ Scholars have also advanced proposals for new multilateral governance frameworks for climate-induced migration based on the 1951 Refugee Convention.⁴⁹

Beyond academic debate, climate-induced migration has finally gained traction in the international community. Starting with the Cancun Adaptation Framework, human mobility was first recognized within the global climate debate within the United Nations Framework Convention on Climate Change in 2010.⁵⁰ The landmark Paris Agreement helped build this momentum, establishing in 2015 the Task Force on Displacement under the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts to “avert, minimize and address displacement related to the adverse impacts of climate change.”⁵¹ The Global Compact on Migration crystallized this momentum, recognizing climate change as a unique migration driver in 2018.⁵²

The Global Compact on Migration, the first international cooperative agreement on migration, evolved from a concerted push towards increasing state-sponsored legal migration pathways, including for climate migrants. Endorsed by over 160 countries, the Global Compact on Migration recognizes that national and regional actors may be in the best position to address climate-induced migration.⁵³ The Global Compact on Migration recommends that states increase regular migration opportunities—including humanitarian visas, private sponsorships, and temporary work permits—in response to slow- and sudden-onset disasters in order to ensure that migration becomes an experience of dignity rather than an act of despair.⁵⁴

⁴⁸ Harriet Grant et al., *UK Should Open Borders to Climate Refugees Says Bangladeshi Minister*, THE GUARDIAN (Dec. 4, 2009, 3:55 PM), <https://perma.cc/7BFC-KCR7>. The Bangladeshi Finance Minister before the Copenhagen climate change conference pushed for the revision of the 1951 Refugee Convention to include climate migrants. The Maldives made a similar proposal earlier in 2006.

⁴⁹ Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, 10 GLOBAL ENVTL. POL. 60 (2010); David Hodgkinson et al., *The Hour When the Ship Comes In: A Convention for Persons Displaced by Climate Change*, 36 MONASH UNIV. L. REV. 69 (2010). See also Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 Harv. Envtl. L. Rev. 349 (2009) (proposing a multilateral treaty that addresses cross-border climate-induced migration).

⁵⁰ United Nations Framework Convention on Climate Change (UNFCCC), Decision 1/CP.16 The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention (UNFCCC/CP/2010/7/Add.1, para 14(f)).

⁵¹ UNFCCC, Report of the Conference of the Parties on its 21st session, held in Paris from 30 November to 13 December 2015, Decision 1/CP.21, para. 49.

⁵² The Global Compact on Safe, Orderly and Regular Migration (2018), *available at* <https://perma.cc/WZ5H-Z6XN> (“The Global Compact on Migration.”).

⁵³ Platform on Disaster Displacement, *State-Led, Regional, Consultative Processes: Opportunities to Develop Legal Frameworks on Disaster Displacement*, in *‘CLIMATE REFUGEES’: BEYOND THE LEGAL IMPASSE* 126, 145 (Simon Berhman & Avidan Kent eds., 2018).

⁵⁴ The Global Compact on Migration *supra* note 52.

As the international conversation on climate-induced migration develops, FMAs should be included in the set of policy proposals states consider. Part III introduces FMAs, and makes a case for including them as part of the solution to climate-induced migration.

3. FREE MOVEMENT AGREEMENTS

3.1 Overview

Free Movement Agreements (FMAs) are provisions within (sub-)regional economic integration schemes that liberalize mobility restrictions between participating member states. The agreements range from removing visa requirements for entry into member states to more comprehensive rights to reside and work.⁵⁵ FMAs can also provide for the mutual recognition of skills and transfer of social security rights.⁵⁶ The agreements may be applied unevenly, with rights and benefits extended to pre-defined categories of people, including migrant workers, business people, students and refugees.⁵⁷ In most regions, FMAs are linked to a common market, where free movement of goods, services, capital and labor serve as the basis of economic integration, and workers are granted the right to enter, work and/or settle in member states.⁵⁸

The EU serves as the most well-known example, but FMAs exist across all continents, with approximately 120 countries participating in regional arrangements that include free movement provisions.⁵⁹ FMAs proliferated with the rise of regional trade agreements.⁶⁰ Africa has adopted the largest number of FMAs, present within the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the East Africa

⁵⁵ United Nations Educational, Scientific and Cultural Organization (UNESCO), *MIGRATION, FREE MOVEMENT AND REGIONAL INTEGRATION* xv (Phillipe de Lombaerde et al. eds., 2017).

⁵⁶ *Id.*

⁵⁷ *Id.* at xx.

⁵⁸ Sonja Nita, *Free Movement of People within Regional Integration Processes: A Comparative View*, in *MIGRATION, FREE MOVEMENT AND REGIONAL INTEGRATION* 3, 7 (Phillipe de Lombaerde et al. eds., 2017). The EU, ECOWAS, MERCOSUR, and CARICOM all adhere to this rubric of free movement within a common market.

⁵⁹ Vincent Chetail, *The Transnational Movement of Persons under General International Law - Mapping the Customary Law Foundations of International Migration Law*, in *RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION* 1, 35 (Vincent Chetail & Céline Bauloz eds., 2014).

⁶⁰ *Id.* at 33-4.

Community (EAC), the Southern Africa Development Community (SADC), and the Economic Community of Central African States (ECCAS).⁶¹ Asia-Pacific FMAs include the Association of South East Asian Nations (ASEAN), and the Asia-Pacific Economic Cooperation (APEC). The Common Market of the South (MERCOSUR), Caribbean Community (CARICOM), and Organisation of Eastern Caribbean States (OECS) serve as prominent examples in Latin America and the Caribbean.⁶²

Rights of entry within FMAs range from relaxing visa requirements for intra-regional travel to authorizing indefinite stays. Some agreements allow for visa free travel, although most grant a temporary visa extension. Within Europe, for example, the Schengen Agreement authorizes visa-free travel for citizens of member states within the Schengen Area. FMAs generally stipulate that entry can be barred if admission would contravene public policy, public security or public health.⁶³ Some FMAs grant residence rights, with most agreements conditioning residence on employment.⁶⁴ The conditioning of residence on employment accords with the aim of most FMAs—to facilitate the movement of labor.

Indeed, FMAs often address labor directly, either facilitating labor migration or granting access to labor markets for certain categories of people, often highly skilled workers. For example, Article 45 of the Treaty on the Functioning of the European Union and Regulation 1612/68 grants nationals of EU member states the right to work in any other member state without a work permit. This right includes equality of treatment, remuneration, and working conditions compared to nationals of the host state.⁶⁵ Similarly, Article 2 of ECOWAS grants the right of residence “for the purpose of seeking and carrying out income earning employment,” although those making use of the framework must apply for a residence card.⁶⁶ Some FMAs follow the General Agreement on Trade in Services (GATS) model by granting labor market access only to service providers on a

⁶¹ *Id.*

⁶² Chetail *supra* note 59.

⁶³ Nita *supra* note 58 at 11-15. The EU is an outlier in stipulating visa-free travel—most agreements grant only temporary visa exemption.

⁶⁴ *Id.*

⁶⁵ *Id.* at 18.

⁶⁶ *Id.* at 19. The supplementary protocol in 1986 granted the right to work.

temporary basis, while others aim to protect the rights of migrant workers instead of regulating market access.⁶⁷

Table 1: Sample of Latin American & Caribbean FMAs⁶⁸

Regional Arrangement	Period of Visa-Free Stay	Categories of Persons	Identification Documents	Grounds for Refusal of Entry	Labor Category Covered	Rights of Residence
Andean Community (CAN)	90 days	CAN nationals and foreign residents	Valid national identification document	Immigration regulations, domestic order, national security, or public health	Individually moving workers, company workers, seasonal workers, border workers, service providers	Temporary residence for two years, with the possibility of extension
Caribbean Community (CARICOM)	6 months	CARICOM citizens	Travel permits, ID cards with photographs, birth certificates, drivers licenses	Security concerns, public safety, public order, or person likely to become a charge on public funds	Certain categories of skilled labor, service providers on a temporary basis	Right of residence after being granted indefinite entry; person must be involved in economic activity and not a charge on public funds
Central American Common Market (CACM)	90 days	Citizens of El Salvador, Guatemala, Honduras, Nicaragua	National identification document or passport	Public order, national interest, or state security	All categories of migrant workers	Renewable temporary residence granted for a period of 2 years; permanent residence must be renewed every 5 years
Southern Common Market (MERCOSUR)	90 days	MERCOSUR citizens	Valid travel document	NA	Service providers, generally all migrant workers	Temporary residence for two years; possibility of permanent residence

⁶⁷ *Id.* at 18.

⁶⁸ Adapted from UNESCO *supra* note 55.

Some FMAs have evolved beyond their common original purpose, that is to liberalize restrictions on the movement of labor, and have moved toward creating social citizenship. For example, MERCOSUR, established in March 1991 among Brazil, Argentina, Uruguay, and Paraguay by the Treaty of Asunción, now aims to “promote channels for social participation as a key way of strengthening regional integration.”⁶⁹ Mutual recognition of skills and qualifications is one aspect of FMAs that coheres to both the economic and social aims of these agreements, alongside social, health and labor regulations. CARICOM, for example, allows workers to secure social security benefits from the schemes to which they have contributed outside of their country of origin. The development of FMAs beyond regulating migration of labor signals their capacity to address other types of human mobility.

3.2 A Caribbean Case Study

3.2.1. Operation in 2017 Atlantic Hurricane Season

The Caribbean region demonstrates the possibility of adapting FMAs to the climate change context. Two Caribbean FMAs embedded within CARICOM and OECS have already facilitated migration after sudden-onset disasters, presenting an example of the benefits FMAs can potentially offer climate migrants. During the 2017 Atlantic Hurricane Season, the CARICOM and OECS FMAs i) provided disaster displaced persons a right of entry in other islands; ii) supported the waiver of travel document requirements where documents had been lost or damaged; iii) granted indefinite stays in some cases, facilitating permanent resettlement; and iv) gave access to foreign labor markets through a mutual recognition of skills scheme and/or a waiver of work permit requirements.

Both the CARICOM and OECS FMAs’ main goal is to support regional economic integration, despite their utility in an environmental context. CARICOM—a regional grouping of fifteen member states representing 16 million people—was established by the 1973 Treaty of Chaguaramas

⁶⁹ Carla Gallinati & Natalia Gavazzo, *We Are All MERCOSUR: Discourses and Practices about Free Movement in the Current Regional Integration of South-America*, in *MIGRATION, FREE MOVEMENT AND REGIONAL INTEGRATION 201, 202* (Phillipe de Lombaerde et al. eds., 2017).

to eliminate tariff and non-tariff barriers to merchandise trade.⁷⁰ The 1973 Treaty of Chaguaramas originally did not conceive of free movement of persons, although it did set up a common market to promote economic integration between and development of member states.⁷¹ Since 1973, CARICOM has developed various bodies and schemes to facilitate integration goals, the most notable of which—the CARICOM Single Market and Economy (CSME)—permits free movement of goods, capital and labor among member states.⁷² Article 45 of the Revised Treaty of Chaguaramas sets a goal of free movement of all member state citizens between member territories, regardless of their employment status.⁷³ Article 46 of the Revised Treaty of Chaguaramas provides for the movement of skilled community nationals, which allows certain categories of workers to access CARICOM island labor markets without a work permit.

Free movement rights can be exercised under three elements of the CSME: the movement of skills, services, and the right of establishment.⁷⁴ Skilled CARICOM nationals—including university graduates, teachers, nurses, and artists—may apply for a Certificate of Recognition of Skills Qualification (Skills Certificate) to work in other member states.⁷⁵ The Skills Certificate does not guarantee permanent residence, but skilled nationals may apply after admission;⁷⁶ skilled nationals may also move with their dependents.⁷⁷ Service providers enjoy movement modeled on the General Agreement on Trade in Services (GATS), but are guaranteed the same treatment as nationals while conducting “approved activities.”⁷⁸ Meanwhile, self-employed nationals engaged in non-wage

⁷⁰ Sophie Nonnenmacher, *Free Movement of Persons in the Caribbean Community*, in INTERNATIONAL MIGRATION LAW 387 (Ryszard Cholewinski et al. eds., 2007); *Who We Are*, CARICOM, <https://perma.cc/G6VE-M53C> (last visited Apr. 18, 2019).

⁷¹ CARICOM, *Treaty Establishing the Caribbean Community*, Art. 38 (1973), available at <https://perma.cc/LM8N-BLG2>.

⁷² Nonnenmacher *supra* note 69 at 389; see also Chad Damro, *The Political Economy of Regional Trade Agreements*, in *Regional Trade Agreements and the WTO Legal System* 23, 33-34 (Lorand Bartels & Federico Ortino eds., 2006).

⁷³ CARICOM, *Revised Treaty of Chaguaramas*, Art. 45 (2001) available at <https://perma.cc/8HRR-QBC6>.

⁷⁴ Nonnenmacher *supra* note 69 at 391.

⁷⁵ CARICOM *supra* note 72 at Art. 46 (providing for the movement of skilled nationals as a step towards general free movement within member state); see also CARICOM, *Single Market and Economy, Free Movement – Travel and Work* 20-26 (3d. Edition), available at <https://perma.cc/SUR4-NGQM>.

⁷⁶ CARICOM, *Single Market and Economy* at 34-35.

⁷⁷ *Id.* at 36. *But see* Nonnenmacher *supra* note 69 at 395 (noting that national law defines dependents according to income tax legislation and social security schemes which leads to uneven application of right of free movement for dependents.).

⁷⁸ Nonnenmacher *supra* note 69 at 393.

earning activities that are commercial, industrial, agricultural, professional or artisanal can enjoy an indefinite stay in another member state by exercising their right to establish a business or right of establishment.⁷⁹ All CARICOM nationals are entitled to 6-month visa-free stays in other member states, unless they are deemed a threat to national security, public safety, order, or morals, or any other basis set out by the Caribbean Court of Justice.⁸⁰

The CARICOM FMA also establishes social measures to facilitate movement. Social security benefits, for example, can be transferred between states.⁸¹ The CARICOM Agreement on Social Security was established in 1996 to ensure that those who migrate to a member state to work, or have worked in multiple member states, have access to benefits from social security schemes to which they have contributed.⁸² The agreement covers contributory pensions for invalidity, disability, old age, and death and survivors' benefits. The agreement does not cover maternity or sickness benefits. The CARICOM Protocol on Contingent Rights ("the Protocol") also aims to support CARICOM nationals exercising their right of establishment, provision of services, movement of capital or free movement of skills. The Protocol extends rights to dependents, grants access to primary education, and ensures a range of property rights.⁸³ The Protocol is not yet in force.

Although only 10% of the collective population of CARICOM member states constitute skilled nationals, there has been a growing number of CARICOM nationals who have migrated to other CARICOM countries under the CSME.⁸⁴ Antigua and Barbuda, Barbados, Belize, Dominica, and Grenada all reported an increased number of CARICOM nationals with verified Skills Certificates in their countries from 2013 to 2016.⁸⁵ Barbados verified as many as 2,166 Skills Certificates in 2016, representing 1% of its total population. Indeed, most immigration to Barbados,

⁷⁹ *Id.* at 394.

⁸⁰ CARICOM, *Single Market and Economy* at 35.

⁸¹ IOM *supra* note 14 at 19; *see also* Nonnenmacher *supra* note 69 at 395 (The 1997 CARICOM Agreement on Social Security "protects all entitlements to long-term benefits by providing for the totalization of all periods in which contributions were paid to social security stems in Member States, and is operational in all Members."); CARICOM, *The 1994 Intra-Regional Double Taxation Agreement prevents self-employed CARICOM nationals from paying taxes twice. Agreement Among the Governments of Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment* (1994), available at <https://perma.cc/7YSZ-GHCS>.

⁸² CARICOM, *Social Security in CARICOM*, available at <https://perma.cc/KBF6-PG73>.

⁸³ CARICOM, *Protocol on Contingent Rights*, available at <https://perma.cc/R6D2-GN67>.

⁸⁴ Nonnenmacher *supra* note 69 at 390.

⁸⁵ Data on file with author.

the CARICOM country which receives the highest number of skilled nationals under CSME, occurs through legal migration pathways, and the extension of free movement protocols to new categories of workers helps to ensure regularized movement of migrants to Barbados.⁸⁶ Recently, CARICOM expanded the categories of workers eligible for a Skills Certificate to agricultural workers and security guards, and contemplated including domestic workers.⁸⁷

OECS, established by the Treaty of Basseterre in 1981, also features a FMA that has facilitated mobility after sudden-onset disasters.⁸⁸ OECS promotes integration between its full member states—Antigua and Barbuda, Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines—on matters such as foreign policy, defense and security, and economic development. The OECS Economic Union, established in January 2011, creates a single financial and economic space wherein goods, services and people move without restriction.⁸⁹ Article 3 of the Revised Treaty of Basseterre sets a principle of “the abolition . . . of the obstacles to the free movement of persons, services and capital.”⁹⁰ Article 12 ensures freedom of movement for OECS nationals within the OECS Economic Union Area, including non-discriminatory access to employment, remuneration and other conditions of work and employment regardless of nationality.

Article 12 also provides that “citizens of Protocol member states shall enjoy in the Economic Union Area the rights contingent to the right of freedom of movement that are agreed by Protocol Member States.”⁹¹ These rights were articulated in the OECS Policy on Rights Contingent to the Freedom of Movement. According to the policy, approved by OECS Heads of State in 2015, the same general and social rights/privileges that are accorded to citizens of the host member state should be extended to all OECS nationals and their spouses and dependents. These rights include access to social systems, labor market schemes, public health care, and education services.

The Revised Treaty of Basseterre also links the principle of free movement of persons to an overall goal of sustainable cultural and economic development in the region. Article 23 recognizes

⁸⁶ CMC *supra* note 18 at 13.

⁸⁷ CMC, *CARICOM Labour Ministers to Meet Wednesday to Discuss Free Movement for Security Guards and Agricultural Workers*, ST. LUCIA NEWS ONLINE (Feb 5., 2019), <https://perma.cc/KC4F-FSWX>.

⁸⁸ Nonnenmacher *supra* note 69 at 387.

⁸⁹ IOM *supra* note 14 at 20.

⁹⁰ OECS, *Revised Treaty of Basseterre*, Art. 3 (2010), available at <https://perma.cc/U9ER-HA4H>.

⁹¹ *Id.* at Art. 12.

that the principle of free movement of persons is linked to ensuring a safe and stable society, and requires states to “provide the enabling legislative, policy and administrative environment needed to support social relations and cohesion for children, youth, men and women in the Economic Union Area, with particular attention to the consequences and impact of the free movement of peoples on shared family responsibilities and economic stability.”⁹² While CARICOM extends free movement to specific categories of workers, all OECS nationals enjoy the right to live and work in other OECS member states.⁹³ These benefits apply equally in a post-disaster context, where OECS citizens should have “unimpeded access to the territory of other OECS States.”⁹⁴

Indeed, both the CARICOM and OECS FMAs were operationalized during the 2017 Atlantic Hurricane Season, during which time three hurricanes displaced three million people in a single month.⁹⁵ After Hurricane Maria, Trinidad and Tobago used the CARICOM FMA’s 6-month visa-free stay provision to shelter displaced Dominicans.⁹⁶ The Antigua, St. Vincent, Grenada and St. Lucia governments also welcomed Dominicans, making use of the OECS FMA.⁹⁷ In some cases, immigration officials admitted Dominicans without the national identification documents—including passports—that are typically required. In these cases, government officials used other forms of identification, including appearance, accent, and family networks, prioritizing 100% admission of arriving Dominican nationals, as well as speed of registration and entry. Finally, St. Lucia also housed prisoners from the British Virgin Islands and the Turks and Caicos Islands after Hurricane Irma damaged prisons.⁹⁸

3.2.2. Challenges

The application of Caribbean labor mobility frameworks in post-disaster contexts does pose challenges. First, immigration officials operating at the border enjoy a high level of discretion. While

⁹² *Id.* at Art. 23.

⁹³ *Id.* at Art. 3(c) & 12.

⁹⁴ Cantor *supra* note 47 at 57.

⁹⁵ UNFCCC, *Warsaw International Mechanism Task Force on Displacement Activities III.1-3* (2018), available at <https://perma.cc/8F22-RQYG>.

⁹⁶ *T&T PM Asks Citizens to Welcome Dominicans Devastated by Hurricane Maria*, STABROEK NEWS (Sept. 22, 2017), <https://perma.cc/3VKN-F4G7>.

⁹⁷ *Antigua Prepares for Influx of Dominicans*, BARBADOS TODAY (Sept. 24, 2017), <https://perma.cc/6X2V-N55A>.

⁹⁸ *Puerto Rico Opens Arms to Refugee from Irma’s Caribbean Chaos*, REUTERS, (Sept. 13, 2017), <https://perma.cc/8VDH-GM5J>. Cantor *supra* note 47 at 58.

this discretion facilitated 100% admission of Dominican nationals after Hurricane Maria, border officials could also deny entry to disaster displaced persons in the future, especially if nationals were considered a threat to the public interest.⁹⁹ Member states may tighten migration policies if the number of disaster displaced persons in the region swells due to increased adverse climate effects, or in response to domestic political pressures.

Second, third country nationals who normally fall outside the scope of these free movement regimes may have enjoyed the opportunity to more easily participate in irregular migration during the 2017 Atlantic Hurricane season. Both St. Lucia and St. Vincent admitted medical students who were not covered under the OECS FMA. St. Vincent reportedly lost track of some of these third country nationals. St. Lucian authorities also faced difficulty distinguishing Haitian nationals from Dominicans; Dominicans, unlike Haitians, are entitled to indefinite stay in St. Lucia. Going forward it will be important to establish a normative framework for the application of Caribbean labor mobility regimes in a post-disaster context.

In sum, Caribbean islands used the CARICOM and OECS FMAs to assist disaster displaced persons during the 2017 Atlantic Hurricane season, but application varied based on national context. As the Executive Director of the Caribbean Disaster Emergency Management Agency noted, protection measures for disaster displaced persons “need full consideration within the context of CARICOM’s broader policy but also individual national government policies.”¹⁰⁰ Recently, Latin American and Caribbean countries agreed on guidance for responses to cross-border displacement in the context of climate change and disasters with the 2014 Brazil Declaration and Plan of Action. The Immigration and Customs Working Group on Disaster—a coalition between the Caribbean Disaster Emergency Management Agency, CARICOM IMPACS and national immigration officials—is also aiming to formalize the practices that facilitated movement during the 2017 Atlantic Hurricane Season, and ensured Caribbean nationals access to entry, labor markets, resettlement, and contingent rights. Formalizing best practices may set the Caribbean up to serve as a model to other regions.

⁹⁹ CARICOM *supra* note 79 at 34-35.

¹⁰⁰ CDEMA, *Statement by Mr. Ronald Jackson, Executive Director of CDEMA on the recognition of International Day for Disaster Reduction* (Oct. 13, 2017), available at <https://perma.cc/DNA7-UWLZ>.

4. APPLICABILITY OF FMAS IN OTHER REGIONS

The use of Caribbean Free Movement Agreements (FMAs) during the 2017 Atlantic Hurricane Season points to broader arguments for leveraging FMAs as a protection framework for climate-induced migration. Given that approximately 120 countries worldwide participate in FMAs, the applicability of FMAs in post-disaster contexts is relevant to regions other than the Caribbean. Indeed, the Platform on Disaster Displacement, the leading intergovernmental initiative on environmental migration, identifies FMAs as one example of state-led humanitarian protection measures that can fill the protection gap for disaster displaced people.¹⁰¹ The Intergovernmental Authority on Development (IGAD) in Eastern Africa is currently developing a protocol on the free movement of persons to implement Art. 7(b) of the Agreement establishing IGAD,¹⁰² and may include protections for climate migrants. African FMAs provide three key benefits to climate migrants; that is, African FMAs give access to territory, grant status and rights during stay, and provide opportunities for lasting solutions.¹⁰³

FMAs serve as a useful protection framework for climate migrants from various regions for three reasons: 1) FMAs respond to the complex and regional nature of climate-induced migration; 2) FMAs build individual and structural resilience; and 3) the expansion of FMAs to account for climate-induced migration is politically feasible. As climate change exacerbates the frequency and intensity of disaster, increasing the number of displaced people, effective policy responses like FMAs will become increasingly critical.

i. FMAs respond to the complex and regional nature of climate-induced migration

Cross-border climate-induced migration is both multi-causal and regional in nature. Climate migrants may be displaced by, or move due to, a combination of economic, political, and social

¹⁰¹ Platform on Disaster Displacement (PDD), *State-Led, Regional, Consultative Processes: Opportunities to Develop Legal Frameworks on Disaster Displacement*, in 'CLIMATE REFUGEES': BEYOND THE LEGAL IMPASSE 126, 135 (Simon Berhman & Avidan Kent eds., 2018); see also Elizabeth Ferris, *Governance and Climate Change-Induced Mobility: International and Regional Frameworks*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS: LAW AND POLICY PERSPECTIVES 11, 24 (Dimitra Manou et al. eds., 2017) (noting that FMAs "might well be the most productive means to address future cross-border movements resulting from the effects of climate change.").

¹⁰² Intergovernmental Authority on Development, *Agreement Establishing IGAD*, Art. 7(b) (1996).

¹⁰³ Tamara Wood, *The Role of Free Movement of Persons Agreements in Addressing Disaster Displacement: A Study of Africa* (May 2019), available at <https://perma.cc/P8WW-CWDG>.

factors. Furthermore, as is true of global migration generally, most cross-border climate-induced migration occurs regionally.¹⁰⁴ The variety in cause (drought, sea-level rise, storms, floods, etc.), type of movement (short term/long term, internal/regional/international), nature of migration (voluntary versus forced), and the difficulty in establishing a direct causal link between climate change and migration have all undermined attempts to address the climate-induced migration protection gap.¹⁰⁵ FMAs have the potential to address the gap because they are responsive to the complex and regional nature of climate-induced migration; these agreements allow for movement before, during, or after a slow- or sudden-onset event, thereby increasing mobility options regardless of whether movement was forced or voluntary, is temporary or permanent, or directly caused by climate change.

FMAs can be responsive to migrant needs in the absence of sharply delineated causal factors. Notwithstanding whether cross-border displacement was prompted by a sudden- and/or slow-onset event, or economic or environmental drivers, FMAs respond not to the root cause of displacement but to its effects. Because the benefits of FMAs are conferred based on nationality, climate migrants can access territory, safety, and even labor markets without having to prove that they are climate migrants. This makes FMAs a particularly useful policy intervention because of the multi-causal nature of climate-induced migration, and the difficulty of distinguishing climate migrants from other categories of people on the move.¹⁰⁶

In other words, FMAs have a significant advantage as a policy proposal because they provide benefits independent of the drivers of movement. FMAs allow migrants to avoid the legal burden “climate refugees” would face in seeking protection under international refugee law or any other multilateral convention modeled on the 1951 Refugee Convention by having to prove they are seeking asylum solely based on climate impacts. The proposal to endow climate migrants with climate passports may also be difficult to operationalize due to causality. The German Advisory Council on Global Change therefore recommends identifying island states that are threatened by territorial loss, and then granting climate passports to citizens of those states without determining

¹⁰⁴ Diego Acosta, *Global Migration Law and Regional Free Movement: Compliance and Adjudication - the Case of South America*, 111 AJIL Unbound 159, 159 (2017).

¹⁰⁵ Elin Jakobsson, *Norm Formalization in International Policy Cooperation: A Framework for Analysis*, in ‘CLIMATE REFUGEES’: BEYOND THE LEGAL IMPASSE 52, 62 (Simon Berhman & Avidan Kent eds., 2018).

¹⁰⁶ See Wood *supra* note 102 at 27.

whether each individual is moving due to climate change.¹⁰⁷ Although this may work for island states, the climate passport may be less suitable outside of the SIDS context where climate impacts will not lead to complete loss of territory. Thus, it would still be largely necessary to determine who is eligible for the passport within a given country on an individual basis. By granting mobility privileges based on nationality independent of climate change as a driver, FMAs avoid the issue of causality, as well as the problem of privileging climate migrants over other categories of migrants, including those migrating for economic reasons.¹⁰⁸

FMAs also provide a regional response to a regional challenge. In Sub-Saharan Africa, 63% of emigrants remain within the region,¹⁰⁹ and 80% remain within the continent.¹¹⁰ Fifty-five percent of cross-border movement is intra-regional in Europe and Central Asia,¹¹¹ while almost a third of migrants remain within the Middle East and North Africa,¹¹² and South Asia.¹¹³ Cross-border regional movement is especially common in countries that share a common border.¹¹⁴ FMAs can capture this short-range cross-border movement.

Because environmental impacts vary across regions, regional responses to managing migration may also be more appropriate.¹¹⁵ FMAs can be tailored to meet regionally-specific needs. Furthermore, FMAs allow for flexibility in moving, placing no restrictions on migrants' ability to return home, or re-enter host countries. Most climate migrants would prefer to stay in place, with evidence showing that the majority of migrants return home when possible.¹¹⁶ The fact that FMAs facilitate movement intra-regionally may also allow migrants to relocate to countries that share

¹⁰⁷ German Advisory Council on Global Change, *Just & In Time Climate Policy: Four Initiatives for a Fair Transformation* (Aug. 2018), available at <https://perma.cc/FQ5E-R23D>.

¹⁰⁸ See Benoît Mayer, *Critical Perspective on the Identification of 'Environmental Refugees' as a Category of Human Rights Concern*, in CLIMATE CHANGE, MIGRATION AND HUMAN RIGHTS: LAW AND POLICY PERSPECTIVES 28, 35-37 (Dimitra Manou et al., ed., 2017).

¹⁰⁹ WORLD BANK, MIGRATION AND REMITTANCES FACTBOOK 33 (2nd ed. 2011)

¹¹⁰ African Union, *Evaluation of the African Union Migration Policy Framework for Africa* (African Union, 2016).

¹¹¹ UNESCO *supra* note 55 at xx.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ M. Beine and Ch. Parsons, *Climate Factors as Determinants of International Migration*, IRES de l'Université Catholique de Louvain Discussion Paper 2012-2 18 (2012).

¹¹⁵ See PDD *supra* note 100 at 137.

¹¹⁶ LM Hunter & RA McLeman, *Migration in the Context of Vulnerability and Adaptation to Climate Change: Insights from Analogues*, 1 WILEY INTERDISCIPLINARY REV. CLIMATE CHANGE; see also Perch-Nielsen et al., *Exploring the Link Between Climate Change and Migration*, 91 CLIMATE CHANGE 381 (2008).

similar cultures and values. This might lessen the adverse impacts of displacement when cross-border migration is the only viable adaptation option.

ii. FMAs build structural and individual resilience

Economic factors generally play a larger role in determining migration outcomes than environmental drivers.¹¹⁷ The difficulty of detangling economic and environmental drivers in migration decisions has stymied attempts to create solutions that support climate migrants in particular. Migrants rarely move due to environmental factors alone, thus invalidating solutions targeted only at climate migrants. However, the weight of economic drivers in environmental migration presents an opportunity for climate-induced migration policy solutions to focus on building economic capacity. FMAs, which increase economic resilience at both the structural and individual level, can reduce the need for migration in the first place.

Migration can serve as a development strategy. African states, for example, supported the Global Compact on Migration because of the need to mainstream “migration into development strategies that include gainful employment, remittances and financial inclusion and the circulation of professionals of all skill levels, and arrangements for free movement.”¹¹⁸ In the Pacific, Australia’s Seasonal Worker Program originally aimed to promote economic development in the Pacific Islands, but is now used to facilitate adaptation.¹¹⁹ FMAs can create an enabling framework for capturing migration-development co-benefits.

Moreover, although economists have focused on South-North migratory flows, research on the international economic integration indicates that FMAs do have important economic benefits intra-regionally.¹²⁰ The EU, for example, has witnessed significant gains through its regional economic integration scheme. A number of studies report that the Schengen area, which allows for passport free cross-border travel and supports the EU’s single market of free movement of goods,

¹¹⁷ Barnett *supra* note 29 at 6.

¹¹⁸ African Union, *Draft Common African Position on the Global Compact for Safe, Orderly and Regular Migration* 5 (Oct. 2017), available at <https://perma.cc/4PZ3-W9HC>.

¹¹⁹ Richard Bedford et al., *Managed Temporary Labour Migration of Pacific Islanders to Australia and New Zealand in the Early Twenty-First Century*, 48 AUSTL. GEOGRAPHY 37–57 (2017).

¹²⁰ PETER ROBSON, *THE ECONOMICS OF INTERNATIONAL INTEGRATION* (1980).

persons, services and capital, confers economic benefits to participating States.¹²¹ Bilateral net trade increases by 0.09% annually when two countries participate in the Schengen area.¹²² Intra-European trade reached more than €5 trillion in 2014, and has increased over time. Moreover, the increase in immigration associated with the Schengen area has a positive impact on trade; a 1% increase in immigration is connected to a 0.09% increase in imports.¹²³ A 2011 study showed that the Schengen area “significantly decreases the trade frictions between trade partners and facilitates cross- country trade integration.”¹²⁴ More research on the benefits of international economic integration is warranted.

While the EU serves as an example of the economic benefits of FMAs, economic inequality between States can hinder the efficacy of regional integration schemes.¹²⁵ The Southern Africa Development Community’s (SADC) goal of full free movement by 2005 was scaled back, for example, due to concerns that economic disparity within the region would lead to mass migration to South Africa.¹²⁶ SADC’s later protocol eliminated references to free movement, and replaced a guaranteed right to entry with state commitment to facilitating entry, residence and establishment.¹²⁷

FMAs may also facilitate movement to areas that are similarly environmentally vulnerable.¹²⁸ Yet FMAs’ ability to achieve economic gains through integration can lead to increased resilience, improving countries’ ability to withstand disasters, and reducing migrant exposure when moving to areas with similar geographic vulnerability.

Migration can also increase economic resilience at a community and individual level. Remittances play a key role in increasing community resilience in countries of origin,¹²⁹ with

¹²¹ European Parliament, *The Economic Impact of Suspending Schengen* (Mar. 2016), <https://perma.cc/8Z69-U38E>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ UNESCO *supra* note 55 at xxiii.

¹²⁶ J.O. Oucho & J. Crush, *Contra Free Movement: South Africa and the SADC Migration Protocols*, 48 AFRICA TODAY 139-146 (2001); Jonathan Martens, *Moving Freely on the African Continent: The Experiences of ECOWAS and SADC with Free Movement Protocols*, in INTERNATIONAL MIGRATION LAW 349, 359 (Ryszard Cholewinski et al. eds., 2007).

¹²⁷ The 1997 Draft Protocol on the Facilitation of Movement of Persons in the Southern African Development Community, SADC Secretariat, Gaborone (Jan. 1997).

¹²⁸ See Black et al., *Migration as Adaptation*, 478 NATURE 447, available at <https://perma.cc/89T4-X43A> (noting that people are equally likely to migrate to places that are environmentally vulnerable as they are to emigrate out of these places).

¹²⁹ Barnett *supra* note 29 at 22.

payments supporting investments in housing, health, education, and daily subsistence needs.¹³⁰ A U.N. University study in the Pacific found that remittances can help households adapt to climate change impacts.¹³¹

Noneconomic exchange also increases community resilience. When migrants are secure in their ability to move between their home and host countries, as FMAs allow, they return often, enhancing the adaptive capacity of their communities of origin by increasing understanding of climate change risks and responses, strengthening social networks, and transferring goods and new skills.¹³² The majority of migrants of working age participate in the labor market, and migration can improve income and living standards.¹³³ Circular, temporary and permanent migration can also expand livelihood options.¹³⁴

iii. FMAs are more politically feasible than a global multilateral agreement & can be adapted to the climate context

Though there are certainly exceptions, expanding FMAs to account for climate-induced migration is politically feasible in many places. Neighboring states are more likely to share similar concerns and thus can reach consensus more quickly than in a global multilateral process.¹³⁵ Additionally, regional agreements are easier to achieve because fewer states are involved than at a global multilateral level, and regions may demonstrate greater levels of mutual trust.¹³⁶ For these reasons, regional solutions to climate-induced migration provide an important protection stop-gap while the international community works to deal with the issue.¹³⁷

¹³⁰ Nicholas Van Hear, "I Went as Far as My Money Would Take Me," in FORCED MIGRATION & GLOBAL PROCESSES 125, 137 (François Crépeau & Delphine Nakache eds., 2006).

¹³¹ United Nations University, *Climate Change & Migration in the Pacific: Links, attitudes, and future scenarios in Nauru, Tuvalu, and Kiribati*, available at <https://perma.cc/NZ8F-FDT6>.

¹³² Barnett *supra* note 29 at 23.

¹³³ Michelle Leighton & Meredith Byrne, *With Millions Displaced by Climate Change or Extreme Weather, Is There a Role for Labor Migration Pathways*, MIGRATION POLICY INSTITUTE (Feb. 3, 2017), <https://perma.cc/GCA6-GSKB>.

¹³⁴ *Can Free-Movement Agreements Help People Displaced by Climate Change & Disaster*, KANDOR CTR. FOR INT'L REFUGEE L. (Feb. 6, 2018), <https://perma.cc/24X8-67LJ>.

¹³⁵ PDD *supra* note 100 at 137.

¹³⁶ UNESCO *supra* note 55 at xiv.

¹³⁷ PDD *supra* note 100 at 137.

Cross-border migration is transnational by definition, and cooperation is possible at the regional level in the current political climate.¹³⁸ While global multilateral agreements on migration prove difficult because of divergent interests between sending and receiving countries and national security concerns, states have responded to environmental mobility challenges regionally.¹³⁹ Some states outside the Caribbean region have signaled a willingness to leverage FMAs in the climate context. African States, for example, “have recognised the broader potential of free movement agreements as well – noting their potential to provide alternative pathways to durable solutions for refugeesⁱ and contribute to improved peace and security within the region.”¹⁴⁰ The EU has also demonstrated readiness to use its FMA to facilitate movement for EU citizens because of disasters.¹⁴¹

Practitioners and scholars have supported a regional approach to migration management, claiming that states will more likely abrogate their authority at the regional level, and are more inclined to negotiate with similarly-situated states.¹⁴² Regional arrangements can result in more even distribution of benefits between sending and receiving countries, in comparison to bilateral agreements, which tend to favor the receiving country.¹⁴³ FMAs present a legal framework through which regional management can operate.

Requiring fewer states to buy-in than a global multilateral convention, FMAs can also be more readily adapted to the demands of climate-induced migration. One aspect of reform would need to be the inclusion of social citizenship. Past FMAs have demonstrated that granting entry without access to citizenship or social benefits can trap migrants in a status as second-rate citizens. The Compact of Free Association with Palau, Federated States of Micronesia and Marshall Islands, for example, allows visa-free entry into the U.S. but not provide access to citizenship or federal benefits. This makes accessing state-sponsored health care difficult.¹⁴⁴ FMAs should come with

¹³⁸ AOIFE MCMAHON, *THE ROLE OF THE STATE IN MIGRATION CONTROL: THE LEGITIMACY GAP AND MOVES TOWARDS A REGIONAL MODEL* 221 (2017).

¹³⁹ UNESCO *supra* note 55 at xiii.

¹⁴⁰ Kenya Embraces the IGAD Regional Protocol on Free Movement of Persons, INTER-GOVERNMENTAL AUTHORITY ON DEVELOPMENT (20 February 2018), <https://perma.cc/R92B-XLXC>.

¹⁴¹ UNGA, *Report of the Special Representative of the Secretary-General on Migration*, A/71/728, para. 32.

¹⁴² See e.g., McMahon *supra* note 140 at 10; Benoît Mayer, *Environmental Migration: Prospects for a Regional Governance in the Asia-Pacific Region*, 16 *Asia-Pacific J. Env't. L.* 73, 92-93 (2013).

¹⁴³ UNESCO *supra* note 55 at xv.

¹⁴⁴ See Jacob Appel et al., *Hawaii's COFA Islanders: Improving Health Access and Outcomes* (Jan. 2017), <https://perma.cc/GQ7P-HQGU>.

“regional citizenship” that guarantees economic, social, and political rights” to circumvent discrimination against foreign nationals and discourage movement.”¹⁴⁵ Given that few FMAs currently guarantee regional citizenship, these frameworks would need to be redesigned to fully be protective frameworks. FMAs would also need to protect against forcible return.¹⁴⁶ Many FMAs prohibit mass expulsion, cautioning that individual cases for deportation be considered on their own merits. However, provisions that limit state discretion to suspend FMAs or the rights of migrants would add further protection. Re-designing FMAs to fully address climate-induced migration remains more easily achieved at the regional versus the global level.

5. CONCLUSION

Climate change exacerbates environmental migration. Extreme weather events, including frequent and severe storms and drought, have already displaced millions of people worldwide. As climate change intensifies these extreme weather events, an increasing number of climate migrants will need to relocate either within their countries or abroad. The majority of climate-induced migration will occur within national borders. However, climate migrants from SIDS and low-capacity states are especially at risk given that their ability to respond to disaster is limited.

FMAs provided a range of protective measures to Caribbean people displaced during the 2017 Atlantic Hurricane Season. Two Caribbean FMAs:

- 1. Granted disaster displaced persons a right of entry in other islands;**
- 2. Supported the waiver of travel document requirements where documents had been lost or damaged;**
- 3. Granted indefinite stays in some cases, facilitating permanent resettlement; and**
- 4. Gave access to foreign labor markets through a mutual recognition of skills scheme and/or a waiver of work permit requirements.**

These benefits were critical because climate migrants enjoy no guaranteed rights of entry, work, or resettlement when displaced across borders by disaster.

¹⁴⁵ UNESCO *supra* note 55 at xxiv.

¹⁴⁶ See Wood *supra* note 102 at 43.

Given that 120 countries worldwide participate in FMAs, FMAs could be useful in other regional contexts. Adapting FMAs to address climate-induced migration would be an important intervention given that no governing framework for climate-induced migration yet exists, and climate migrants enjoy no legal status under international law. FMAs are particularly well-suited to address the climate-induced migration protection gap because they grant access to territory and safety regardless of the drivers of movement, which are often difficult to disaggregate. FMAs also provide a regional response to a regional challenge, build economic resilience at the structural and individual level, and are more easily amended than global multilateral agreements.

Recent international processes such as the Global Compact on Migration, the Sendai Framework for Disaster Risk Reduction and the United Nations Framework on Climate Change have underscored the importance of climate-induced migration, and advanced recommendations for closing the protection gap. Given the utility of FMAs as a protection stop-gap, FMAs should be included in the suite of options used to address climate-induced migration.
